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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 444

EUGENE W. OSMENT, PETITIONER,

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

JOSEPH A. PADWAY,
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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The above named petitioner respectfully petitions for a writ of certiorari to review a decision of the Supreme Court of Missouri reversing a judgment in petitioner's favor entered in the Circuit Court of Jackson County, Missouri, in an action brought under the Federal Employer's Liability Act as amended effective August 11, 1939 (45 U. S. C. A. Sec. 51, *et seq.*) 52 Stat. 1404.

Summary Statement of Matter Involved.

The petitioner, Eugene W. Osment, a railroad worker, was injured totally and permanently while in the employ of respondents, interstate carriers. His injury resulted

from the rough horseplay of an extraordinary strong fellow employee whom respondents keep in their employ though they knew he was addicted to engage in horseplay that was dangerous to the other employees, and from the deliberate failure of a Company guard to intervene and prevent this employee from choking your petitioner to unconsciousness although this guard was charged with the duty to prevent such dangerous and foolish horseplay. Your petitioner brought action under the Federal Employers' Liability Act as amended effective August 11, 1939 (45 U. S. C. A. Sec. 51 *et seq.*), 52 Stat. 1404, and was awarded a verdict of Fifty Thousand Dollars in the trial court, which was reduced on remittitur to Thirty-Five Thousand and judgment entered thereon. Defendants therein, respondents here, appealed to the Supreme Court of Missouri and the cause was referred to Division Two of that Court. Division Two of the Supreme Court of Missouri reversed the judgment. A petition for rehearing was filed and denied. Your petitioner then, on June 11, 1942, filed a petition in the Supreme Court of the United States for a writ of certiorari to the Supreme Court of Missouri. Nine copies of this petition are being filed with the Clerk of the United States Supreme Court as Exhibit "A" of the instant petition for a writ of certiorari and we incorporate it herein by reference.

On October 12, 1942, the Supreme Court of the United States denied this first petition for a writ of certiorari in this case stating:

> "Per Curiam: The last clause of Sec. 4 of the 1890 amendments to Article VI of the Missouri Constitution provides that 'when a division of the Supreme Court of Missouri in which a cause is pending shall so order, the cause shall be transferred to the court for its decision.' In Scheufler *v.* Manufacturing Lumbermen's Underwriters, decided July 7th, 1942, the Su-

preme Court of Missouri stated that under this clause 'either division on application or its own motion and for reasons deemed sufficient though not enumerated in the section may order a cause transferred to the court en banc'. 163 S. W. 2d 749, 750. In this case petitioner made no application to transfer the cause from Division Two where it was heard and decided, to the court en banc. As it does not appear that petitioner has exhausted the appellate review provided by state law, the petition for certiorari must be denied for want of jurisdiction. Gorman *v.* Washington University, 316 U. S. 98, and cases cited."

Pursuant to this decision, your petitioner herein filed a motion in the Missouri Court requesting the court to exercise its discretion and to transfer the cause to the court en banc or to refuse to transfer the cause to the court en banc (R. 569). An order of the court was sought and granted giving leave to file this motion (R. 569). The respondents then filed a motion to strike petitioner's motion to transfer (R. 574) and on June 7, 1943, an order was entered in the Supreme Court of Missouri sustaining the respondents' motion to strike (R. 588).

We shall not set forth herein a detailed summary of the facts involved in this case, but respectfully direct this Honorable Court's attention to Exhibit "A" of this petition wherein the facts, the theories of recovery, and the evidence are fully discussed.

Statement as to Jurisdiction.

The Court has jurisdiction over this case under the provisions of the Act of Congress of February 13, 1925, Section 237-2; 28 U. S. C. A., Section 344-B providing that this Court has jurisdiction—

"to require that there be certified to it for review and determination with the same power and authority

> and with like effect as if brought up by appeal any clause wherein a final judgment or decree has been rendered and passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution or laws of the United States; * * *."

This case involves a federal statute, specifically the Federal Employers' Liability Act as amended, effective as of August 11, 1939, 53 Stat. 1404 (Title 45 U. S. C. A. Sec. 51 *et seq.*).

The original petition for a writ of certiorari filed in the Supreme Court of the United States in this cause, Exhibit "A" hereof, was denied on the grounds that petitioner had not exhausted the appellate review provided for by state law in that after Division Two of the Supreme Court of Missouri rendered its decision reversing the judgment of the trial court no application was made by your petitioner for a transfer of the case from the division of the court to the court en banc.

Section 1 of the Amendment of 1890 to article 6 of the Constitution of the State of Missouri establishes two divisions of the Supreme Court of the state. Section 4 [1] of that amendment provides for certain instances in which a losing party before a Division has a *right upon application* to have the cause transferred to the court en banc. In addition,

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[1] "When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; *or, when a division in which a cause is pending shall so order, the cause shall be transferred to the court* for its decision" (Italics ours).

Section 4 provides " * * * when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

None of the instances pursuant to which the petitioner would have a *right* to review by the court en banc existed in this case and, therefore, it could be heard and passed upon by the Supreme Court of Missouri en banc only if Division Two of the Court in the exercise of its discretion ordered it transferred to the court en banc.

Division Two did not order the cause transferred nor did petitioner at the time of that Division's decision move Division Two to order the cause transferred because that was a matter solely within the discretion of the Court.

After this Court denied your petitioner's original petition for a writ of certiorari (Exhibit A) stating "as it does not appear that petitioner has exhausted the appellate review provided by state law, the petition for certiorari must be denied for want of jurisdiction", your petitioner requested Division Two of the Missouri Supreme Court to exercise its discretion (R. 569). The Respondents moved to strike petitioner's motion (R. 574) and upon consideration of the motions of petitioner and respondent the Court sustained respondents' motion to strike (R. 588).

Questions Presented.

In addition to questions arising under the Federal Employers' Liability Act as amended, effective August 11, 1939, (45 U. S. C. A. 51 *et seq.*), 52 Stat. 1404, which are set forth on pages 19 and 20 of Exhibit "A" to this petition and to which we respectfully refer the Court's attention, is the question:

(1) Has your petitioner exhausted the appellate review provided by the laws of the State of Missouri?

Reasons Relied On for Allowance of Writ.

We shall not repeat herein the reasons for the allowance of the writ as those reasons are addressed to the petitioner's rights under the Federal Employers' Liability Act, but we respectfully request that the court refer to pages 21 *et seq.* of Exhibit "A" of this petition. In addition to the reasons set forth therein we rely on the reason that:

Petitioner has exhausted all of the appellate review provided by the laws of the State of Missouri.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under seal of this Court, directed to the Supreme Court of Missouri, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings in the case of *Eugene W. Osment, Respondent* v. *Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of the Wabash Railway Company, a corporation, Appellants,* No. 35575, to the end that this cause may be reviewed and determined by this Court, as provided for in the Statutes of the United States, and that the findings and rulings of said Supreme Court to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

EUGENE W. OSMENT, PETITIONER,

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Missouri in *Eugene W. Osment, Respondent,* v. *Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of the Wabash Railway Company, a corporation, Appellants,* is reported in 159 S. W. (2d) 666.

II.

Statement as to Jurisdiction.

The statement concerning jurisdiction is set forth in the petition and is incorporated herein by reference.

Argument in support of this Court's jurisdiction is made hereinafter.

III.

Statement of the Case.

The statement of the case appears in the petition and in Exhibit "A" of the petition. It is incorporated herein by reference.

IV.

Specificiations of Error.

The specifications of error are set forth on pages 28 and 29 of Exhibit "A" of the petition and are incorporated herein by reference.

V.

Argument.

This case involves an employee of an interstate carrier. The employee, your petitioner, was seriously injured, while engaged in his employment, as the result of the dangerous and rough horseplay of a fellow employee. This employee, one John Stalac, seized Osment, your petitioner, about the neck and squeezed him, choking off his air, until he became unconscious, then abruptly released him, and Osment fell to the ground fracturing his skull. A guard, employed by the company, and whose duties included the prevention of such horseplay, was standing nearby and observed the whole incident without taking steps to assist the petitioner or to stop Stalac from injuring the petitioner.

Action was brought by the petitioner against the respondents under the Federal Employers Liability Act (as amended, effective as of August 11, 1939, 53 Stat. 1404 (Title 45 U. S. C. A. Sec. 51, *et seq.*)), and a jury awarded

a verdict of Fifty Thousand ($50,000.00) Dollars in his favor, which was reduced on remitter to Thirty-Five Thousand ($35,000.00) Dollars and judgment entered thereon. This judgment was reversed outright on appeal by Division Two of the Missouri Supreme Court. A petition for a writ of certiorari to review this decision of Division Two of the Supreme Court of Missouri was filed in this Court on June 11, 1942, and denied on October 12, 1942, on the grounds that petitioner had not exhausted the appellate review provided by state law (Exhibit "A").

Those aspects of the case, which are concerned with the petitioner's rights under the Federal Employees Liability Act and the errors of Division Two of the Missouri Supreme Court in failing to hold according to the decisions of the United States Supreme Court, are fully discussed and argued in the brief submitted to this Court in support of the petitioner's first petition for a writ of certiorari in this case. This brief is attached to Exhibit "A" of our petition, and nine copies are being filed with the Clerk of this Court. In lieu of repeating and reprinting herein the entire brief submitted in support of the first petition, we incorporate it herein by reference and refer the Court to it for a full discussion of the facts and merits of the case as distinguished from the procedural aspects of the case. We shall then in this brief address ourselves only to the question of whether petitioner has exhausted the appellate review provided by the law of the State of Missouri, thus removing that defect of the case upon which this Court based its denial of the original petition for a writ of certiorari.

Article VI of the 1890 Amendments to the Missouri Constitution establishes two divisions of the Supreme Court of the State. Section 4 of this Article provides for the transfer of causes from these divisions to the Supreme Court

en banc. Section 4 is divided into two distinct parts, the first providing

> "When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision;".

The second part of Section 4 provides

> "or, when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

Thus, the first part of this Section 4 sets forth certain cases and circumstances pursuant to which the losing party has a *right upon application* to have the cause transferred to and heard by the Court *en banc,* while the second part gives the litigant no right but authorizes the Court in its discretion to transfer a case to the Court *en banc.*

The instant case did not involve any of the circumstances, nor was it the type of case which would give petitioner a right upon application to have the cause heard by the Court *en banc.*

McAllister v. *St. L. Mchts. Bridge & Ter. Ry. Co.,* 324 Mo. 1005, 25 S. W. (2) 791;

Riley v. *Wabash Ry. Co.,* 328 Mo. 910, 44 S. W. (2d) 136;

Huckleberry v. *Mo. Pac. Ry. Co.,* 324 Mo. 775, 26 S. W. (2) 980.

Then the petitioner's case could be reviewed by the Supreme Court of Missouri sitting *en banc* only if Division Two, in its discretion, exercised its authority under the

second part of Section 4 of Article VI of the Missouri Constitution and ordered the case transferred.[2]

Rule 24 of the Missouri Supreme Court provides that

> "A motion to transfer a cause under the provision of the Constitution from either division to Court *en banc* must be filed within ten days after the final disposition of the cause by the division * * *."

Under this rule any litigant with a case within the coverage of the first part of Section 4 would lose his right of review by the Court *en banc* if he fails to file a motion to transfer within the ten-day period provided for. But this ten-day period is a time limitation in which the litigant must exercise his right to have his cause transferred to the Court *en banc* and is not a limitation upon the time in which a division of the Court must exercise its discretion and authority to order the case transferred to the Court *en banc*. The constitution of the state places no such time limitation upon the divisions of the Court, nor does the language of Rule 24 purport to place any such limitation upon the divisions of the Court. Then a division of the Court can order a case transferred at any time so long as the case is within its jurisdiction.

Petitioner did not file a motion with Division Two to transfer the case to the Court *en banc* within this ten-day period provided for in Rule 24 because he had no right to have his case transferred by that Division, but could have a review by the court *en banc* only if the Division, in the

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[2] It should be noted that the Missouri procedure is not comparable to certiorari. The Divisions of the Court are not inferior courts. *State* v. *Duestrow*, 137 Mo. 44, 39 S. W. 266; *State* v. *Hamey*, 168 Mo. 167, 67 S. W. 620; *Scheuffer* v. *Mfg. Lumbermen's Underwriters*, 163 S. W. (2) 750; and it is the divisions, not the Court *en banc*, which have the authority to have a case transferred and reviewed by the Court *en banc*. (Article VI, Sec. 4, Mo. Constitution.)

exercise of its authority, ordered the case transferred. But by failing to file a motion with Division Two to transfer the case to the Court *en banc* within the ten-day period the petitioner lost no *right* to have the case reviewed by the Court *en banc* for he never had a right to such review. The only possible purpose or effect of such a motion would be to encourage the court to exercise its discretion in regard to the question of whether nor not to order the case transferred. Since the laws of Missouri and Rules of its courts impose no limitation of time in which a Division of the Court may exercise its authority and order a case transferred, should it in its discretion decide to do so, it is immaterial whether such a motion was filed within the ten-day limitation provided by Rule 24 of the Missouri Supreme Court or after the ten days had expired, for it could only influence the Court to exercise its discretion and dispose of the question of the possibility of the losing litigant obtaining a further review of his case by the Court *en banc.*

After this Court denied his petition for writ of certiorari on the grounds that appellate review provided for by state law had not been exhausted, the petitioner filed a motion with the Missouri Court (R. 569) requesting it to exercise its discretion and thus dispose of the question of appellate review by the state courts. By entering an order permitting this motion to be filed (R. 569) and by entertaining this motion, the Court demonstrated that it had retained jurisdiction over this case and that the case could receive further review should Division Two, in the exercise of its discretion, order the case transferred to the Court *en banc.* It is interesting to note that the Chief Justice who signed the order permitting the motion to transfer to be filed is a member of Division Two of the Court.

After the Court had accepted petitioner's motion to transfer the case, the respondents filed a motion to strike petitioner's motion (R. 574). The motion to strike was granted (R. 588).

Thus, pursuant to the Decision of this Honorable Court of October 12, 1942, denying petitioner's original petition for a writ of certiorari (R. 578), petitioner proceeded to have all appellate review provided by the laws of Missouri exhausted. Division Two of the Missouri Court, by refusing to grant petitioner's motion to transfer the case to the Court *en banc*, declined to exercise its discretion to order the cause transferred to the Court *en banc*, and only by Division Two ordering the case transferred, in the exercise of its discretion, could there have been any further appellate review of the case under the laws of Missouri. And so now all possible appellate review of this case under the laws of Missouri has been exhausted.

Conclusion.

It is respectfully submitted that appellate review provided for under the laws of the State of Missouri has been exhausted, that the holding of Division Two of the Supreme Court of Missouri is contrary to the construction given the Federal Employees Liability Act by this Court, and that the holding of Division Two of the Supreme Court of Missouri should be reversed.

WHEREFORE, petitioner respectfully urges that this Court grant a writ of certiorari to the Supreme Court of Missouri and review and reverse the holding and decision of that court.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1943.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF THE RESPONDENTS IN OPPOSITION
and
EXHIBIT.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF THE RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Court below (R. 510) is reported in 349 Mo. 137, 159 S. W. 2d 666.

The opinion of this Court on petitioner's first petition for certiorari (cause No. 140) is reported in 317 U. S. 587, 87 L. Ed. 21.

JURISDICTION.

The jurisdiction of the Court is invoked under Sec. 237 of the Judicial Code as amended by an act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 937, U. S. C. A., Title 28, Sections 344 and 344 (b), to review a judgment of Division Two of the Supreme Court of Missouri rendered in an action brought under the Federal Employers' Liability Act as amended August 11th, 1939, Title 45, U. S. C. A., Sec. 51, 53 Stat. 1404.

QUESTIONS PRESENTED.

1. Has this court jurisdiction to review the decision in question which was rendered by Division Two of the Supreme Court of Missouri, when a request for review of such decision by the Supreme Court of Missouri *en banc* was not timely made and when made was not entertained on the merits, but was stricken from the files?

2. Even if this Court has jurisdiction should it exercise its discretionary power by certiorari to review the decision in question where such decision holds: that the master is not liable for an act of horseplay by his servant, who is known to be addicted to horseplay, when such act is outside the scope of his employment, and where liability is predicated on the theory that retaining such servant in employment was negligence and on the theory that the master negligently failed to protect another servant from injury from such an act.

STATEMENT.

This is the second petition to this Court for a writ of certiorari to the Supreme Court of Missouri in this case. The first petition was denied October 12, 1942 (R. 571). *Osment* v. *Pitcairn et al.*, 317 U. S. 587, 87 L. Ed. 21.

In denying the petition, this Court said:

> "In this case petitioner made no application to transfer the cause from Division Two, where it was heard and decided, to the court *en banc*. As it does not appear that petitioner has exhausted the appellate review provided by state law, the petition for certiorari must be denied for want of jurisdiction."

(a) *The record discloses the following proceedings*:

December 16, 1941, Division Two of the Supreme Court of Missouri rendered its opinion in this case, reversing outright the judgment of the trial court in petitioner's favor (R. 510).

Within ten days thereafter, petitioner filed a motion for rehearing in Division Two of the Supreme Court of Missouri (R. 516).

March 13, 1942, Division Two overruled petitioner's motion for rehearing (R. 566). This was during the September, 1941, term of the Supreme Court of Missouri.

October 12, 1942, this Court denied certiorari because petitioner had not exhausted the appellate review provided by state law. Thereupon the mandate was sent down to the Supreme Court of Missouri.

In accordance with Sec. 1235, R. S. of Mo., 1939, the Clerk of the Supreme Court of Missouri sent down the mandate to the Jackson County Circuit Court, the trial court, and on November 21, 1942, record of the receipt and filing of the mandate was made by the Clerk of that court, and the judgment in favor of petitioner was set aside and judgment entered for respondents. The mandate was never thereafter recalled (See Exhibit 1, this brief).

March 3, 1943, petitioner made application to the Chief Justice of the Supreme Court of Missouri *en banc* to file a motion to transfer the cause from Division Two to the court *en banc*. The Chief Justice of the court *en banc* granted the leave (R. 569), and the motion to transfer was filed in the court *en banc* (R. 569). This

was in the September, 1942, term of the Supreme Court of Missouri (Sec. 2047, R. S. of Mo., 1939).

Thereupon respondents filed a motion to strike petitioner's motion to transfer to the court *en banc* from the files as untimely, because the Supreme Court of Missouri had lost jurisdiction of the cause, and because the motion to transfer was not filed within the time provided by Rule 24 of that court (R. 574).

April 1, 1943, petitioner amended his motion to transfer, and requested the Supreme Court of Missouri to recall the mandate from the trial court (R. 585).

On June 7, 1943, the Supreme Court of Missouri sustained respondents' motion to strike petitioner's motion to transfer the cause to the court *en banc* from the files (R. 588). Petitioner's motion to transfer was not considered on the merits, and the mandate was not recalled (Exhibit 1, this brief).

On August 23, 1943 (after the close of the October, 1942, term of this court), Robert H. Jackson, Associate Justice of the Supreme Court of the United States, ordered that the time for filing a petition for certiorari in this cause be extended to October 7, 1943, and on October 4, 1943, again extended the time for filing petition for certiorari to October 21, 1943.

On October 20, 1943, this petition for certiorari was filed in this court.

(b) *Facts on which petitioner's cause of action was based:*

This action was begun in the Circuit Court of Jackson County, Missouri, under the Federal Employers' Liability Act. The plaintiff, petitioner here, recovered judgment in the trial court which was reversed outright by Division Two of the Missouri Supreme Court. The evidence in the case was as follows—On August 21, 1939, petitioner Osment, a switchman in the employ of the respondents, was standing in respondents' freight house with Chamberlain

and Gardner, two members of his switching crew, near a water fountain. Finnell, a patrolman in the Wabash Receiver's Special Service Department, was sitting near the fountain facing the switching crew and about four or five feet from Osment. Gardner was facing Osment (R. 50) and Chamberlain was standing at Osment's right side. While the men were in these positions, and within a few feet of each other, John Stalac, a young man in the messenger department of the Wabash receivers, came through the freight house. He had no business with Osment or Finnell or any member of Osment's switching crew (R. 33, 134). He came up behind Osment, and without indicating what he intended to do (R. 24), put his arm around Osment's shoulder and neck in such manner that Osment could not see who it was, and held it there for from ten to thirty or forty seconds, Osment slipped to the floor in a sitting position and then fell back, striking the back of his head on the concrete floor. He was unconscious for a few seconds and there was a small abrasion on the back of his head and a little blood (R. 49). Stalac took Osment over to the water cooler, washed off Osment's head and put some disinfectant on it. While doing this, Osment and Stalac were talking and laughing over the occurrence and were apparently friendly (R. 49, 50). The Wabash Receivers offered no evidence on the accident and all of the testimony on that phase of the case is that of Osment's witnesses Chamberlain, Gardner and Osment.

Stalac went to work for Respondents as a young boy; he was playful like a big pup, addicted to good natured horseplay (R. 48). All of Osment's witnesses agree that when Stalac put his arm around Osment's shoulders, Osment did not struggle or cry out (R. 33, 50) and Chamberlain and Gardner, who were looking right at Osment, did not know that he was in any difficulty until he slipped to the floor (R. 33). Even then Gardner thought Osment was shamming (R. 45).

The amended petition (R. 2) after alleging that Stalac was employed by respondents as a messenger, and that

Finnell was employed by respondents as a peace officer whose duty it was to protect the property of respondents and protect their employees, charged that Stalac suddenly and without cause or warning seized Osment from behind about his throat and neck in the presence of Finnell and injured Osment. The petition alleged three grounds of negligence: (1) that Stalac was an incompetent and dangerous man for respondents to have in their employ, to respondents' knowledge, and that respondents were negligent in retaining and continuing him in their employ, (2) that respondents owed Osment a duty to maintain a safe place to work and that the retention of Stalac in their employ, knowing his dangerous characteristics, was negligence and ratified his conduct and dangerous condition and approved his assault on Osment, and (3) that Finnell, who knew of Stalac's dangerous propensities, was employed by respondents to protect Osment and other employees from attacks, assaults, etc., and that Finnell who was present when Stalac assaulted Osment, permitted, ratified and allowed the dangerous seizure when with the means at hand and in time he could have stopped and prevented the seizure and have warned Osment of Stalac's presence and of the impending seizure in time to have prevented the same and have prevented the resultant injuries after the peril and seizure arose.

The first two allegations of negligence are based on the retention of Stalac, the third on Finnell's failure to act after Osment's peril was known by Finnell to be imminent. The third theory of recovery went out of the case on the court's refusal to give petitioner's Instruction 3 (R. 297).

The answer was a general denial.

SUMMARY OF ARGUMENT.

(1) This Court does not have jurisdiction to review the decision in question because:

(a) The Supreme Court of Missouri did not have jurisdiction to entertain, and did not entertain on the merits, petitioner's motion to transfer the cause to the Supreme Court of Missouri, *en banc,* but struck it from the files; petitioner's motion was filed after the term had expired at which final judgment was rendered in the cause by Division Two of the Supreme Court of Missouri and after the mandate had gone down to the trial court.

(b) Petitioner's motion to transfer was not filed within the time provided by Rule 24 of the Supreme Court of Missouri and was stricken from the files.

(c) Leave was granted and petitioner's motion to transfer was filed in the Supreme Court of Missouri *en banc,* which under no circumstances has the power to entertain motions to transfer from division to the court *en banc;* under the Missouri law, motions to transfer must be filed in the division which decided the cause; the motion was not considered on the merits, but was stricken from the files.

(d) The untimely motion of the petitioner to exhaust the appellate review provided by state law, which was not considered on its merits does not give this court jurisdiction.

(2) Even if this Court has jurisdiction, the petition for certiorari should be denied because the decision of Division Two of the Missouri court, in holding that a master is not liable for an act of horseplay of his servant, who is known to be addicted to horseplay, when such act is outside the scope of his employment and where liability is claimed on the theory that retaining such servant in employment was negligence and on the theory that the master negligently failed to protect another servant from injury from such an act, is not contrary to but is in accord with the applicable decisions of this Court.

ARGUMENT.

I.

This Court Does Not Have Jurisdiction.

The opinion in this cause was rendered by Division Two of the Supreme Court of Missouri on December 16, 1941. A timely motion for rehearing was filed in said court by petitioner herein, which motion was overruled on March 13, 1942. Within three months thereafter, petitioner filed his first petition for certiorari, which was denied by this court on October 12, 1942, because petitioner had made no application to transfer the cause from Division Two of the Supreme Court of Missouri, which heard and decided the cause, to the court *en banc*, and had therefore not exhausted the appellate review provided by state law. *Eugene W. Osment* v. *Norman B. Pitcairn et al., Receivers*, 317 U. S. 587, 87 L. Ed. 21; citing *Gorman* v. *Washington University*, 316 U. S. 98, 86 L. Ed. 895; *Scheuffler* v. *Manufacturing Lumbermen's Underwriters*, 349 Mo. 855, 163 S. W. 2d 749 (Mo). See also respondents' brief on first petition for certiorari, case No. 140, October. 1942, term.

On March 3, 1943, petitioner asked leave to file and filed in the Supreme Court of Missouri *en banc*, a motion to transfer the cause from Division Two to the court *en banc* (R. 569). The September term, 1941, of the Supreme Court of Missouri, the term at which petitioner's motion for rehearing was denied by Division Two, expired May 4, 1942. Sec. 2047, R. S. of Mo., 1939.

The motion to transfer to the Supreme Court of Missouri *en banc* was not filed until the September, 1942, term of that court, namely on March 3, 1943 (R. 569). Respondents thereupon filed in the Supreme Court of Missouri, a motion to strike petitioner's motion to transfer from the

files. The grounds set forth in the motion to strike were: first, that the court had no jurisdiction to entertain petitioner's motion because the term of the Supreme Court of Missouri, at which petitioner's motion for rehearing was denied, had expired; second, that the court had no jurisdiction because the mandate had gone down to the trial court; and third, that the motion to transfer was not filed within the time provided by Rule 24 of the Supreme Court of Missouri. The motion to strike was sustained.

That the Supreme Court of Missouri lost jurisdiction of the cause at the expiration of its September, 1941, term of said court while no motion was pending in said court, and therefore had no power to entertain petitioner's motion to transfer, has been definitely and conclusively settled by the decision in the case of *Aetna Insurance Company* v. *Hyde, Superintendent of Insurance*, 327 Mo. 115, 34 S. W. 2d 85, decided by the court *en banc*. In that case, the Court held that the withholding of the mandate to allow application for certiorari to be made to the Supreme Court of the United States did not toll the jurisdiction of the Supreme Court of Missouri over the cause beyond the end of its term at which its decision was rendered. That the Supreme Court of Missouri has no jurisdiction after the term has expired at which the cause was determined, is and always has been the law of Missouri.

Prassee v. *Prassee*, 343 Mo. 388, 115 S. W. 2d 809.
Hurt v. *Edwards*, 347 Mo. 667, 148 S. W. 2d 542.

It is equally well settled in Missouri that the Supreme Court of Missouri lost jurisdiction of this cause when the mandate was transmitted to the trial court. *Gary Realty Company* v. *Sweeney*, 207 S. W. 43 (Sup.); *State ex rel. Broaddus*, 234 Mo. 358.

The motion to transfer filed in the September, 1942, term of the Supreme Court of Missouri therefore was not timely because that court did not have jurisdiction to entertain it when filed. The Court recognized that it had

no jurisdiction, and struck petitioner's motion to transfer from the files (R. 588).

Not only did the Supreme Court of Missouri have no jurisdiction to entertain petitioner's motion to transfer, but the motion was not timely filed under Rule 24 of that court. Rule 24 provided that a motion to transfer a cause under the provisions of the Constitution from either division to the court *en banc* must be filed within ten days after the final disposition of the cause by the division. The motion for rehearing was overruled by Division Two on March 13, 1942. The motion to transfer was not filed until March 3, 1943, almost a year after final disposition of the cause in Division Two, and not within the ten days provided by Rule 24. The Supreme Court of Missouri sustained the motion to strike petitioner's motion to transfer from the files, and did not entertain it on the merits.

Both on account of lack of jurisdiction and under Rule 24, petitioner's motion to transfer was not timely filed in the Supreme Court of Missouri. By striking the motion from the files, the court not only refused to entertain it on the merits, but recognized that it could not do so. This court, in somewhat analogous situations, has dealt with the effect of filing untimely motions which were not entertained on the merits as conferring jurisdiction on this court, and has held that the effect of such motions is nil to confer jurisdiction on this court.

Gypsy Oil Company v. *Escoe*, 275 U. S. 498, 72 L. Ed. 393.

Pfister v. *Northern Illinois Fin. Corp.*, 317 U. S. 144, 87 L. Ed. 123.

Benard's v. *Johnson*, 314 U. S. 19 (l. c. 31), 86 L. Ed. 11 (l. c. 19).

Therefore, since the petitioner did not seek to exhaust his appellate review in the state court until the possibility of such review was barred by that court's loss of jurisdiction and under its Rule 24, his untimely effort, which was not and could not have been entertained on the merits, did not give this court jurisdiction, and the petition for certiorari must be denied for want of jurisdiction.

PETITIONER'S BRIEF.

Petitioner completely overlooks the question of the jurisdiction of the Supreme Court of Missouri to entertain petitioner's motion to transfer, when the record affirmatively shows that the court had lost jurisdiction because such motion was filed after the term had expired at which the cause was finally decided by that court, and after the mandate had gone down. He merely contends that Rule 24 of the Supreme Court of Missouri does not apply to motions to transfer directed to the court's discretion under the last clause of Section 4 of the 1890 Amendments to Article VI of the Missouri Constitution, and that, therefore, motions to transfer on discretionary grounds do not have to be filed within ten days after the overruling of the motion for rehearing. Even in this he is in error.

Section 4 of said Amendments provides:

> "When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; *or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision*" (Italics ours).

Rule 24 of the Supreme Court of Missouri, which fixes the time for filing motions to transfer, is as follows:

> "A motion to transfer a cause under the provisions of the Constitution from either division to court *en banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23."

The Supreme Court of Missouri in *Scheuffler* v. *Manufacturer's Lumbermen's Underwriters*, 349 Mo. 855, 163 S. W. 2d 750, stated:

> "Under the last clause of this Section (referring to Section 4 above), either division, *on application* or its own motion and for reasons deemed sufficient though not enumerated in the Section, may order a cause transferred to the court *en banc*" (Italics ours).

It will be noted that Rule 24 fixes the time for filing of motions to transfer "under the Constitution." The Scheuffler case holds that under the last clause of Section 4 of the constitutional provisions above quoted, either division *on application* may order the transfer. It will also be noted that the Osment opinion by this Court recognized that a motion to transfer, based on the last clause of Section 4, must be filed in order to exhaust the appellate review provided by Missouri law.

Since, therefore, a motion to transfer must be filed to exhaust appellate review under Missouri law, and since a motion to transfer on discretionary grounds is a motion to transfer under the Constitution, Rule 24, which fixes the time for filing motions to transfer, applies, and such a motion is not timely filed unless filed within the ten days provided by the rule. The construction of the Missouri Constitution and Rule 24, which petitioner urges, would lead to the abominable result that in every case decided by a division of the Supreme Court of Missouri, no matter how long ago, a motion to transfer on discretionary grounds would be in time, no matter when filed. Petitioner has simply failed to exhaust the appellate review provided by state law, by failing to act in time, and his untimely motion to transfer does not give this court jurisdiction in this cause.

On Page 5 of his petition and brief, petitioner states that the Supreme Court of Missouri "upon consideration of the motions of petitioner and respondent sustained

respondent's motion to strike." The record fails to show that petitioner's motion to transfer was considered. The fact that the court struck it from the files affirmatively shows that it was not considered. The record only shows that respondent's motion to strike was considered (R. 588).

On Page 12 of his petition and brief, petitioner argues that leave to file the motion granted by the Chief Justice of the court *en banc*, "and by entertaining this motion," the court demonstrated that it had retained jurisdiction over this case. The granting of leave to file an untimely motion does not constitute an entertainment of such motion on its merits sufficient to give this court jurisdiction.

Gypsy Oil Company v. *Escoe*, 275 U. S. 498, 72 L. Ed. 393.

Pfister v. *Northern Illinois Fin. Corp.*, 317 U. S. 144, 87 L. Ed. 123.

Benard's v. *Johnson*, 314 U. S. 19 (l. c. 31), 86 L. Ed. 11 (l. c. 19).

The motion was not entertained but was stricken from the files. Also under the Scheuffler opinion the Chief Justice of the court *en banc* did not have the *power* to grant the leave and court *en banc* had no power to entertain the motion, because such a motion or leave to file such a motion must be filed in the Division which decided the case.

We, therefore, urge that the untimely motion of petitioner to exhaust the appellate review provided by state law, which motion was not entertained on its merits, does not give this court jurisdiction, and the petition for certiorari should be denied for want of jurisdiction.

II.

Even If This Court Has Jurisdiction the Petition for a Writ of Certiorari Should Be Denied.

Petitioner does not argue his petition on the merits but incorporates by reference his brief on his first petition for certiorari. For the court's convenience we are repeat-

ing here what we said in our brief on the first petition on this point.

The decision of the Missouri court is that a master is not liable under the Federal Employers' Liability Act for an act of horseplay of his servant, known to be addicted to horseplay, when committed outside the scope of his employment and where liability is predicated on the theory that he retained a dangerous servant in his employ and on the theory that the master failed to protect another servant from such an act. That decision is in harmony with the following applicable decisions of this court:

In *Davis* v. *Green,* 260 U. S. 349, an employee of a railroad, known to be dangerous, while acting outside the scope of his employment, shot and killed another employee of the railroad. The theory of recovery under the Federal Employers' Liability Act was the employment of a dangerous man. This Court in denying liability said:

> "The ground on which the railroad company was held was that it had negligently employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business or as anything but a wanton and wilful act, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words, that he did a wilful act wholly outside the scope of his employment, while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of *respondeat superior* applies."

After the Green case, the plaintiff in *Atlantic Coast Line* v. *Southwell,* 275 U. S. 64, seeking to avoid the ef-

fect of the decision of this Court in the Green case, based his right to recover under the Federal Employers' Liability Act for the death of an employee caused by another employee acting outside the scope of his employment, on the employer's failure to prevent the death where the master knew of bad feeling between the employees. The Court in denying the right of recovery said:

> "* * * In view of the decision in *Davis* v. *Green*, 260 U. S. 349, 67 L. Ed. 299, 43 Sup. Ct. Rep. 123, the plaintiff did not attempt to hold the petitioner liable as principal in the act, but relied upon its *failure to prevent the death.*
>
> * * * * * * *
>
> "It is not necessary to state the facts in detail. Those mainly relied upon are that Fonvielle, the general yardmaster, knew that Southwell, the man who was killed, on previous occasions had used threatening language to Dallas, who shot Southwell; that Fonvielle knew or ought to have known that they were likely to meet when they did; that Fonvielle was with Dallas, his subordinate, just before that moment and that Dallas said to him, 'Cap., all I want to do is to ask Southwell to lay off of me and let me alone,' and that Fonvielle said that he must not see Southwell, that if he saw him and talked to him he might bring about unpleasant consequences; that Fonvielle left Dallas and after having gone a short distance saw him and Southwell approaching each other and had taken a few steps towards them with a view to separating them in case of an altercation, but that before he had time to reach them the shot was fired. Fonvielle knew that Dallas had a pistol, but there was a strike at the time, Dallas was a special policeman and had a right to carry it and not unnaturally did. The only sinister designs of which there is any evidence were of Southwell against Dallas, unless Dallas' remark just before the shooting be taken to foreshadow the event, which it certainly did not seem to until after the event had happened. It appears to us extravagant to hold the petitioner liable in a case like this."

The Green and Southwell decisions completely dispose of petitioner' contentions here that there is liability at common law for (1) the retention of a man known to be addicted to horseplay where his act of horseplay causing injury was outside the scope of his employment and (2) failure to protect against such an act of such a man.

Petitioner seeks to enlarge the master's common law duty to protect Osment from Stalac's act outside the scope of his employment, by claiming that the master here had assumed the duty of protection against acts of an employee outside the scope of his employment, by creating a special service department. His petition (R. 2) does not plead the rules of the special service department by which it is erroneously claimed such an assumed duty arose. In Missouri, where it is sought to enlarge the master's common law duties by rules, the rules must be pleaded which was not done. *Nivert* v. *Wabash R. Co.*, 232 Mo. 626, *Kirkland* v. *Bixby*, 282 Mo. 462, and *Martin* v. *Wabash Ry. Co.*, 325 Mo. 1107.

Further, the first and second grounds of negligence alleged in the petition, as set out on page 4 of this brief, are based on the retention of Stalac. The third ground of negligence, which is based on Finnell's failure to act, with time, means and opportunity at hand to prevent the injury after Osment's peril arose, was not submitted to the jury (R. 297) and petitioner took no appeal from the action of the trial court's refusal to submit. Also we contend that the rules should not be interpreted as raising a duty to Osment beyond that imposed by the common law and were never intended for that purpose. They were the rules of a separate department and Osment did not know what they were (R. 135). We also contend that Finnell's failure to act was not the proximate cause of Osment's injury. Osment's witnesses agree that Osment did not cry out or struggle, he did not change appearance until he dropped to the ground, and there was nothing in his actions or appearance that indicated that he was in any

trouble or difficulty until he dropped to the ground (R. 33, 44, 45, 50).

But regardless of these contentions, there is no liability here. In *St. Louis & S. F. Ry.* v. *Mills,* 271 U. S. 344, it was contended that because the Railway Company furnished a guard to protect an employee on his way home during a strike, that the Railway Company was liable for the employee's death caused by one of the strikers in the presence of the guard. This court held that there is no duty growing out of the relationship of employer and employee requiring the employer to guard the employee, and that the fact that the employer voluntarily provided some protection against apprehended danger did not give rise to an inference that it undertook to do more. The Court further held that it would not do for the jury to speculate on what would have happened if additional guards had been present. In the course of its opinion this court said:

> "* * * There was no evidence that petitioner had ever furnished decedent or any other employee with more than one guard in going to or from work; or any other evidence from which it could be inferred that petitioner had undertaken, or held itself out as undertaking, to furnish more protection to the decedent or its other workmen 'than it actually did furnish.'
>
> "The respondent here asserts that the defendant, having assumed to do something, should have done more. But the bare fact that the employer voluntarily provided some protection against an apprehended danger, by undertaking to do something which involved no special knowledge or skill, can give rise to no inference that it undertook to do more. Respondent therefore relies on the breach of a duty which does not exist at common law, and of whose genesis in fact it offers no evidence."

Thus the Green, Southwell and Mills cases, decided by this court, establish: (1) that the master is not liable for the assault by a known dangerous employee upon

another where the act is not committed in the scope of the dangerous employee's employment or in furtherance of the master's business; (2) that even though the master has knowledge of the dangerous characteristics of an employee, and even though he may anticipate that those characteristics will bring about a situation where someone is apt to be hurt, the master is under no duty to prevent or protect against an act which was not done in the course of the master's business; (3) that even though the master may anticipate danger to the employee from the acts of others, either not employees or employees acting outside the scope of employment, and even though the master may assume some duty to protect against those acts, that assumption does not make the master an insurer, or require him to give more protection than he has actually assumed to give.

Petitioner in his brief on his first petition for certiorari which he incorporates in his present brief cites *Fletcher* v. *B. & P. R. Co.*, 168 U. S. 135, 42 L. Ed. 411, as authority for the proposition that a master has a duty to control his servant while acting outside of the scope of his employment. The liability in that case was not predicated on the duty of a master toward his servant, but was based on the duty of a railroad toward members of the public who may be lawfully using the street. Briefly the facts were as follows:

For a period of several years the defendant railroad had given its express consent that workmen, returning home at the close of the day's work, might take home for firewood odd pieces of bridge timber, ties, etc., which were left over after repairing the road. The railroad had consented that these odd pieces might be thrown off the moving train at points nearest the homes of the respective men, with the admonition that the men must be careful not to hurt anyone in throwing the wood off. Plaintiff was employed in the shop of the railroad and had finished

his day's work and was walking home along the street when a piece of timber was thrown from the train, striking and injuring plaintiff after it rebounded on the street.

The question for consideration was, as stated in the opinion page 140, "whether the company was guilty of an omission of the duty which it owed the plaintiff, as one of the public lawfully using the street where the track was." Although the plaintiff was employed in the defendant's shops, yet, at the time of the injury, he had finished his work and was walking along the street toward his home and his status was that of "one of the public lawfully using the street."

The opinion of the Court in holding the defendant liable is not controlling here for a number of reasons, to-wit: (1) It was decided prior to the *Green, Southwell* and *Mills cases, supra;* (2) it did not arise under the Federal Employers' Liability Act, nor did it involve the relation of master and servant between plaintiff and defendant; (3) it involved the duty of a common carrier to persons using public streets and any reference to private property is dictum; (4) express consent was given by the railroad for the act done; (5) it was based on a practice or custom which was neither pleaded, proved nor relied on in the case at bar; and (6) although decided in 1897, it has never been cited by any United States court as upholding the doctrine contended for by the plaintiff here.

The decision of Division Two of the Missouri Supreme Court is in harmony with the *Green, Southwell* and *Mills cases, supra,* decided by this Court and the petition for a writ of certiorari should be denied.

Conclusion.

We respectfully submit that this Court has no jurisdiction to review the decision of Division Two of the Missouri Supreme Court and further that even if it has jurisdiction the Missouri decision not only does not conflict

with the decisions of this Court but is in accord with them, and the petition for certiorari should be denied.

Respectfully submitted,

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EXHIBIT I.

Be It Remembered that on the 11th day of the regular November Term, 1942 of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 21st day of November 1942, the following proceedings were had and made of record before Honorable Paul A. Buzard, Judge of Division No. 8 in the cause entitled:

Eugene W. Osment, Respondent Plaintiff, Vs. Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of the Wabash Railway Co., a Corp., Appellants Defendants. No. 469553

Now on this day there is received and filed herein in the Mandate of the Supreme Court of Missouri, reversing the judgment of this court heretofore on the 7th day of June, 1940, entered herein in Record Book 817 at page 29 of this court in favor of plaintiff (Respondent) and against the defendant (Appellant) in the sum of $50,000.00.

Wherefore, it is ordered and adjudged by the court in accordance with said Mandate filed herein, the judgment aforesaid be, and the same is hereby set aside and for naught held, and that said defendants (Appellants) go hence discharged without day and recover of and from said plaintiff (Respondent) its costs herein and that execution issue therefor.

State Of Missouri County Of Jackson SS.

I, Bernard T. Flannery, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of the Filing Of The Mandate And The Judgment Rendered Thereon and it is further certified that after a

search of the index in this cause no further entries appear on this date, November 4th, 1943.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, in my office in Kansas City, Missouri, this 4th day of November, 1943.

Bernard T. Flannery,
Clerk,
By M. L. Shipp,
Deputy.

(Seal)